

UNITED STATES BANKRUPTCY COURT
For The Northern District of California

FILED

APR 15 2011

United States Bankruptcy Court
San Jose, California

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re]	Case No. 10-51546-ASW
KYUNG S. SONG, aka MICHAEL SONG,]	Chapter 7
Debtor.]	
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FRANCISCO DE ANDA,]	Adv. Proc. No. 10-05138
Plaintiff,]	
v.]	
KYUNG S. SONG, aka MICHAEL SONG,]	
Defendant.]	

MEMORANDUM DECISION GRANTING DISCHARGE

Before the Court is a complaint by Francisco De Anda ("Creditor") against Kyung S. Song, aka Michael Song ("Debtor"), the debtor in this Chapter 7¹ case. The complaint seeks a denial of Debtor's discharge pursuant to the following Bankruptcy Code sections: 727(a)(2) as arising from an alleged transfer of Debtor's property within a year of the petition date with an intent to

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

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1 hinder, delay or defraud creditors; 727(a)(3) as arising from an
2 alleged failure to keep records; 727(a)(4) as arising from Debtor's
3 alleged knowingly and fraudulent false oaths in connection with the
4 case; 727(a)(5) as arising from an alleged failure to explain
5 satisfactorily the loss of assets or deficiency of assets to meet
6 Debtor's liabilities; 727(a)(7) as arising from Debtor's alleged
7 violations of Bankruptcy Code sections 727(a)(2), (3), (4) and/or
8 (5) in the Chapter 7 Bankruptcy case of Pacific Prepay Telecom,
9 Inc. ("PPT"); and/or 727(a)(11) as arising from Debtor's alleged
10 failure to complete an instructional course concerning personal
11 financial management described in Bankruptcy Code section 111.

12 Creditor is represented by Mark B. Freschi, Esq. of the Law
13 Offices of Mark B. Freschi. Debtor is represented by Sean M.
14 Jacobson, Esq. of the Law Offices of Cohen and Jacobson. A trial
15 was held on January 24 and 27, 2011, and the matter has been
16 submitted for decision.

17 At the trial, Creditor called as witnesses: Marc Del Piero, the
18 Chapter 7 Trustee in PPT's bankruptcy; Marei T. Banuelos, the
19 manager of a produce market; Ronald Bender, a private investigator;
20 and Debtor. Creditor admitted the following into evidence:

21 (1) transcripts of the meeting of creditors ("341 hearing") held on
22 multiple dates: June 17, 2009, July 1, 2009, August 12, 2009,
23 February 18 and 25, 2010, March 9, 2010, and April 8, 22, and 29,
24 2010; and (2) the depositions of Ricardo Cardenas, Jorge Gonzales,
25 and Martha Ayala.² Creditor also read into the record selected
26

27 ² Debtor raised objections prior to trial regarding the
28 admissibility of the stated evidence. However, at trial the
parties stipulated to the admission of the evidence. Therefore,
the objections are deemed withdrawn.

1 portions of the depositions of Ricardo Cardenas, the owner of
2 Quadrant, a phone card distributorship; and Jorge Gonzalez, the
3 office manager of Quadrant.

4 Debtor only called Debtor as a witness; read selected portions
5 of the depositions of Martha Ayala and Ricardo Cardenas; and
6 submitted portions of the transcripts of the depositions of
7 Creditor, Ricardo Cardenas, and Jorge Gonzalez. Debtor read into
8 the record a selected portion of the 341 hearings from PPT's
9 Chapter 11 case heard on August 26, 2009 and from PPT's Chapter 7
10 case heard on April 8 and 22, 2010. Debtor also submitted into
11 evidence transcripts of the aforementioned 341 hearings and a
12 portion of the 341 hearing conducted in the instant case on May 20,
13 2010.

14 In response to Debtor's intent to offer the deposition
15 testimony of Creditor, Creditor also sought to introduce additional
16 selected portions of Creditor's deposition. Debtor submitted a
17 written objection that was not ruled on at trial which, among other
18 things, argued that a party is not permitted to cite to his or her
19 own deposition testimony. To achieve full fairness, the Court
20 considered all portions of Creditor's deposition which Creditor
21 sought to offer. No information contained in the deposition
22 portions which Creditor sought to introduce changes the result
23 herein.

24 This Memorandum Decision constitutes the Court's findings of
25 fact and conclusions of law, pursuant to Rule 7052 of the Federal
26 Rules of Bankruptcy Procedure.

I.

FACTS

Debtor commenced this case by filing a petition under Chapter 7 on February 18, 2010.³ Creditor commenced the adversary proceeding by filing a complaint on May 21, 2010. On June 24, 2010, Debtor filed an answer to the complaint. The trial was held on January 24 and 27, 2011. The dispute between Debtor and Creditor surrounds Debtor's corporation, PPT, and PPT's relationship, if any, with Pacific Phone Card, Inc ("PPC").

Debtor's first language is Korean. Debtor understands and speaks English, but not with the fluency of a natural speaker. Debtor understood the questions asked at trial but with some difficulty. The Court found Debtor to be generally credible, trying to answer Creditor's attorney's questions honestly. Creditor was present in Court at trial, however, Creditor did not take the stand to challenge any of Debtor's testimony.

Debtor testified to the following facts at trial unless otherwise indicated. Since June 2007, Debtor was the sole shareholder and president of PPT. PPT ceased operations in December 2009. When PPT was active, PPT would purchase phone cards from a supplier and then resell the cards to independent contractors ("Independent Contractors").⁴ The Independent

³ Debtor previously filed a Chapter 7 in 2009 that was dismissed for failure to file a credit counseling certificate and provide income tax returns. On June 19, 2010, a report of no distribution was issued in Debtor's current Chapter 7 by the Chapter 7 Trustee, Audrey Barris. Debtor testified that in the current case, Debtor has completed the financial management class.

⁴ Debtor testified that the Independent Contractors with whom PPT dealt included Neftali Rubio, Patty Cervantes, Miriam, Sam Chong, and Lucy Gomez.

1 Contractors would in turn sell the phone cards to retailers who
2 would sell the cards to end users.

3 Debtor testified as to the following. None of the Independent
4 Contractors were employees of PPT.⁵ PPT had no control over to
5 whom the Independent Contractors sold the phone cards and PPT did
6 not have any personal or direct contact with the Independent
7 Contractor's customers -- the retailers.⁶ The accounts generated
8 out of the Independent Contractor's relationship with the retailers
9 belonged to the Independent Contractors and not PPT.⁷

10 Debtor further testified that PPT did not own Creditor's
11 accounts. Debtor testified that, when Creditor stopped purchasing
12 phone cards, Debtor did not take over Creditor's accounts and
13 Creditor did not offer to turn the accounts over to Debtor.
14 Creditor testified during deposition that Creditor sold Creditor's
15 accounts to Card Depot. De Anda Deposition, page 40:2-41:7.

16 Prior to June 2007, PPT purchased phone cards from California
17 Alliance Telecom ("CAT"). CAT purchased the phone cards from Total
18 Call International ("TCI"). As of June 2007, PPT quarreled with
19 CAT and TCI regarding an exclusivity agreement. As a result of the
20 dispute, in June 2007, PPT withheld payment for phone cards that
21

22 ⁵ Debtor supported this contention with PPT's payroll
23 register which did not list any of the individual Independent
24 Contractors, Exhibit U, and the payroll audit for June 29, 2009
through November 27, 2009 which did not list any of the Independent
Contractors as employees, Exhibit V.

25 ⁶ Debtor testified that PPT did not care what price
26 Independent Contractors charged for the phone cards and that the
Independent Contractors were responsible for payment to PPT.

27 ⁷ Martha Ayala, the owner of a store in Patterson,
28 California, testified in deposition that Ayala would purchase cards
from the same salespeople regardless of which company the
salespeople were working for. Ayala Deposition, page 33:12-15.

1 were delivered previously to PPT. At the end of June 2007, CAT
2 deactivated the phone cards due to PPT's failure to pay. At the
3 time of deactivation, some of the phone cards were in the hands of
4 independent contractors, retailers and end users.

5 Creditor purchased phone cards from PPT using postdated checks.
6 By the time the phone cards were deactivated, PPT had cashed some
7 of the postdated checks. Creditor and Debtor had a dispute
8 regarding the manner in which Creditor would be repaid for the
9 deactivated phone cards.

10 Debtor testified that PPT gave refunds to the Independent
11 Contractors for the unusable cards. Debtor testified that PPT
12 would issue a refund only after first identifying that the cards
13 were purchased from PPT. PPT would either reduce the amount of
14 debt that the Independent Contractor owed PPT or would give the
15 Independent Contractor cash in exchange for the deactivated cards.

16 Debtor testified that Creditor returned two batches of
17 deactivated cards. In the first batch, Debtor testified that
18 roughly thirty percent of the cards were not from PPT. PPT gave
19 Creditor either credit or cash for those cards identified as PPT
20 product. However, Debtor explained that PPT did not reimburse
21 Creditor for the second batch of cards because Creditor refused to
22 allow Debtor to go through the cards to ensure that the cards were
23 PPT product.

24 Creditor sued Debtor in Superior Court of Santa Clara County
25 to resolve the dispute. A week before the trial, PPT filed a
26 Chapter 11 bankruptcy case. Around May 2009, the state court
27 issued a judgment in favor of Creditor and against Debtor for
28 \$96,000. On the record before the Court, there is no evidence that

1 the Superior Court made a finding of fraud or willful and malicious
2 behavior on the part of Debtor. The judgment, however, did not
3 extend to PPT because the Chapter 11 stayed the state court
4 proceedings as to PPT. PPT's Chapter 11 case was ultimately
5 dismissed.

6 Around July 2007, after PPT's dispute with CAT and TCI, PPT
7 began purchasing cards from PPC. At that time, PPC was newly
8 incorporated by Sang Hak Lee, aka Stephen Lee ("Lee"). Debtor
9 testified that Lee knew that PPT needed phone cards because that
10 fact was common knowledge.

11 Debtor testified that ordinarily the phone card would display
12 the logo of the party who owned the card. Prior to the CAT
13 dispute, cards were issued that displayed PPT's logo. From 2007
14 onward, no phone cards displayed PPT's logo. There were phone
15 cards that displayed the logo of either Quadrant or PPC.

16 In early 2007, before creating PPC, Lee was an Independent
17 Contractor who purchased phone cards from PPT for about three
18 months. Debtor testified that Debtor did not know Lee prior to
19 Lee's business relationship with PPT. Debtor further testified
20 that Lee was never an employee of PPT and never received a salary
21 from PPT.

22 Debtor testified that the only connection between PPC and PPT
23 was the purchasing of phone cards. Debtor stated that Debtor was
24 not involved in the creation, management or finances of PPC and
25 that Debtor has no ownership interest in PPC. Debtor testified
26 Debtor never received any money from PPC. Debtor further testified
27 that neither Debtor nor PPT ever transferred assets to PPC.
28

1 Indeed, no evidence was presented that Debtor ever received any
2 money from PPC. Debtor testified that Debtor's personal tax
3 returns show that Debtor never received any income from PPC.
4 Exhibits E - G. Creditor did not provide any bank or other
5 financial records from either Debtor or PPC to show that Debtor had
6 received any distributions from PPC.

7 PPC purchased phone cards from Quadrant pursuant to a contract
8 (the "Distributorship Agreement") entered into on July 6, 2007
9 between Quadrant and PPC, which Lee negotiated and signed. Debtor
10 testified that the Distributorship Agreement did not list Debtor or
11 PPT, and Debtor was not present when the parties entered into the
12 Distributorship Agreement. Debtor testified that PPT began
13 purchasing cards from PPC after Lee approached Debtor and offered
14 to sell phone cards to PPT.

15 Debtor testified that prior to PPT's arrangement with PPC, PPT
16 looked for a new supplier but, at that time, Debtor was mainly
17 focused on refunding the deactivated cards. Debtor further
18 testified that Debtor did not buy directly from Quadrant because:
19 (1) PPC already had a contractual relationship with Quadrant;
20 (2) PPC had cards and PPT needed them; and (3) Quadrant would not
21 sell directly to PPT because Quadrant already had a distributor in
22 PPT's area, i.e. PPC. Debtor stated that Quadrant would have
23 simply referred Debtor to PPC, Quadrant's distributor for PPT's
24 area.

25 After PPC became PPT's phone card supplier, Debtor communicated
26 with Quadrant, for a little over two years, regarding product
27
28

1 discounts, design, distribution areas and product quantity.⁸ The
2 owner of Quadrant, Ricardo Cardenas, ("Cardenas") testified at
3 deposition that Cardenas dealt with Debtor in relation to PPC from
4 once a month to once every three to four months. Cardenas further
5 testified that Debtor was presented as the manager or person to
6 contact regarding the phone cards. Debtor testified that Debtor
7 assumed Cardenas knew that Debtor was a distributor and did not
8 work for PPC.

9 Debtor testified that Debtor communicated with Quadrant on
10 Lee's behalf because Lee does not speak English well. Debtor
11 further testified that Debtor passed the information obtained from
12 Quadrant along to Lee, who would make the ultimate decisions.

13 Debtor testified that Lee was Debtor's main contact at PPC, and
14 from the period of 2007 through the end of 2009, Debtor and Lee
15 spoke about once a week. Debtor testified that PPT ordered cards
16 either by calling Lee personally or by emailing PPC. Debtor
17 testified that PPC sent invoices to PPT, which PPT normally paid by
18 company check within 7 days from the date of PPC's invoice. Debtor
19 entered the following supporting documents into evidence: (1) PPC's
20 invoices to PPT, Exhibit L; (2) copies of PPT's corresponding
21 cancelled checks, Exhibit L; and (3) PPT's bank statements,
22 Exhibit M.

23 Debtor testified that PPT and PPC never shared an office at
24 Lee's apartment at 1574 Tenaka Place, Sunnyvale, California or at
25 any other location. PPC was centered out of Lee's apartment, on
26 the other hand, PPT had a formal office located at 2855 Kifer Road,

27
28 ⁸ Debtor testified that prior to the time PPT began
purchasing cards from PPC, Debtor neither knew of Quadrant nor knew
Quadrant was supplying cards to Lee and PPC.

1 San Jose, California ("the Kifer Road Office"), and before that,
2 at 3148 El Camino Real, Suite 110, Santa Clara, California. Debtor
3 submitted a copy of the lease agreement for the Kifer Road Office,
4 which lists the only lessee as PPT. Exhibit B. Debtor testified
5 that the Kifer Road Office never had a sign that referred to PPC,
6 but had four signs that referred to PPT. Debtor testified that
7 when Debtor and Cardenas had an in-person business meeting, that
8 meeting did not occur at PPT's office.⁹

9 Debtor testified that during the summer of 2010, Debtor learned
10 that Debtor's ex-wife, Betty Ro, worked for PPC.¹⁰ Debtor testified
11 that prior to Ro's work at PPC, Ro worked for PPT dealing with
12 administrative matters. Debtor further testified that the fact
13 that Ro worked for PPC did not give Debtor knowledge about the
14 workings of PPC.

15 Debtor testified that, in June of 2009, PPT was still
16 purchasing phone cards from PPC, and it was Debtor's impression,
17 from looking at PPC's invoices, that PPC was selling phone cards to
18 entities other than PPT at that time. Exhibit AG. Debtor
19 testified that PPT ceased operations in the end of 2009 because
20 PPT was not generating enough business. PPT's business had been
21 declining prior to that time and the Independent Contractors
22 stopped purchasing phone cards from PPT around September or
23 October 2009.

24
25 ⁹ Debtor picked Cardenas up from the airport and, prior to
26 going to a restaurant, Debtor drove to PPT's office to pick up
papers while Cardenas waited in the car.

27 ¹⁰ On February 5, 2010, during PPT's Chapter 7 341 hearing,
28 Debtor testified that Debtor knew Ro was helping PPC, but did not
know exactly what Ro was doing for PPC. Exhibit 1, page 65:16 -
66:2.

1 Neftali Rubio ("Rubio") was one of PPT's larger Independent
2 Contractors, who sold about 20 to 30 percent of PPT's phone cards.
3 Debtor testified that Rubio stopped purchasing phone cards between
4 September and November 2009.¹¹ Exhibit 12, pages 1-2. Debtor
5 testified that Rubio did not feel comfortable buying phone cards
6 from PPT because PPT was in bankruptcy. Debtor testified that
7 Rubio asked if Rubio could buy phone cards from PPC and Debtor
8 responded that was between Rubio and PPC. Debtor testified that
9 Debtor did not know for sure that Rubio purchased phone cards
10 directly from PPC but could only say for sure that Rubio stopped
11 purchasing phone cards from PPT.

12 Neither Rubio, Lee or Ro told Debtor that any of the
13 Independent Contractors had gone from PPT to PPC. Debtor stated
14 Debtor did not know for sure that the Independent Contractors went
15 to PPC or Quadrant, because PPT no longer had a business
16 relationship with the Independent Contractors after PPT stopped
17 operating.

18 Debtor testified that Debtor translated for Lee for
19 approximately two years, from sometime in late 2007 until PPT went
20 out of business in December 2009. Debtor testified that Debtor was
21 unaware whether PPC had employees who could have translated for
22 Lee. Debtor further testified that Debtor did not translate for
23 Lee during the initial negotiations of the distributorship
24 agreement with Quadrant and Debtor did not know who acted as
25 translator, nor did Debtor know if anyone acted as a translator.
26

27
28 ¹¹ Debtor testified that Rubio continued coming to PPT to pay
for product for about a month or a month and a half after Rubio
stopped purchasing phone cards.

Debtor testified that, after PPT went out of business, Debtor only translated for PPC once in April or May 2010 as a favor to Lee. Debtor testified that during the period of December 2009 to April 2010, Debtor did not work in the phone card business and did nothing to earn money. Debtor further testified that Debtor did not know who translated for Lee during that period of time.¹²

Star Alliance was incorporated in December 2009. Exhibit J. Lee is listed as Star Alliance's secretary on Star Alliance's March 31, 2010 Statement of Information filed with the Secretary of State for California. Exhibit K, line 6. Debtor testified that Debtor is not an officer of Star Alliance and Debtor has no ownership interest in Star Alliance.

Debtor testified that in April or May 2010, Lee contacted Debtor and asked to meet.¹³ In the meeting, Lee appeared to be very sick.¹⁴ Lee told Debtor that Lee would not continue the business too long and this might be the last time Lee and Debtor would see each other. Debtor stated that Lee asked Debtor to call Quadrant to tell Quadrant to find another distributor, but that Lee did not

¹² Debtor testified that Ro speaks English and Lee could have asked Ro to translate.

¹³ In response to questions regarding why Lee called Debtor to translate, four or five months after Lee and Debtor's business relationship had ended, Debtor testified that: (1) Lee and Debtor did business together for close to three years, saw each other every week or every other week and formed a good business relationship over that time; and (2) Debtor believed the main reason was that Lee wanted to say goodbye to Debtor.

Debtor testified that despite Debtor and Lee's good business relationship, Debtor believed it was possible that Lee went behind Debtor's back to sell phone cards to the Independent Contractors.

¹⁴ Debtor testified that Debtor thought Lee had to go for medical treatment but did not know much detail.

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1 tell Debtor about Star Alliance. Debtor testified that the April
2 or May 2010 meeting was the last time Debtor spoke to Lee.

3 Cardenas testified at deposition that Debtor told Cardenas that
4 PPC would no longer be operating and that somebody else would be
5 interested in picking up the distribution. Exhibit 1, page 15:7-9
6 and 15:17-21. Cardenas stated that what Debtor told Cardenas about
7 somebody being interested in picking up the distribution was not
8 specific to Star Alliance. Debtor testified that Debtor did not
9 remember telling Cardenas that Star Alliance would be taking over.

10 Kache Produce is a market that operates in Gilroy, California
11 and has sold telephone cards for 6 years. Marei T. Banuelos
12 ("Banuelos") has been a cashier and supervisor for Kache Produce
13 for 6 years. Banuelos decides which phone cards Kache Produce will
14 carry. During Banuelos's testimony, Banuelos listed the suppliers
15 of telephone cards that Banuelos knew and included "Pacific
16 Prepay,"¹⁵ which Banuelos testified changed its name to PPC, and
17 which Banuelos believes is now called Star Alliance.

18 Banuelos testified that, for around four years, Kache Produce
19 has received phone cards from Patricia Cervantes ("Cervantes").
20 Banuelos stated that for about two to three of the four years,
21 Oscar, an employee of Cervantes, would deliver cards and invoices
22 and would collect money about once a month.

23 Banuelos testified that when Cervantes first came to sell phone
24 cards to Kache Produce, the invoices listed PPC or PPT.¹⁶ Banuelos

26 ¹⁵ Banuelos stated "Pacific Prepay" but the Court assumes that
27 Banuelos meant PPT.

28 ¹⁶ Debtor's testified that the invoices were standard forms
carried by printers and that the Independent Contractors paid for

(continued...)

1 stated that the invoices currently list Star Alliance. Exhibit 27.
2 As Banuelos understands, PPT is the same company as Star Alliance.
3 Banuelos further testified, that PPC was listed on invoices in
4 between PPT and Star Alliance.

5 On cross examination, Banuelos testified that Banuelos did not
6 know Debtor. Banuelos further testified that when Cervantes and
7 Oscar would come to sell phone cards, Banuelos did not tell
8 Cervantes and Oscar that she would only purchase the phone cards
9 if Cervantes and Oscar were working for a certain company.

10 On February 1, 2010, PPT filed its second bankruptcy, a
11 Chapter 7. At that time, PPT was not operating.¹⁷ Marc Del Piero
12 ("Del Piero") was the assigned Chapter 7 Trustee for PPT's
13 Chapter 7 bankruptcy case. Del Piero is a member of the Chapter 7
14 Trustee Panel and has served in that capacity for about three
15 years. Del Piero is generally responsible for cases that originate
16 from Monterey, San Benito, and southern Santa Clara counties.

17 Del Piero testified that Del Piero conducted PPT's 341 hearing
18 over multiple sessions due to a lack of availability of documents
19 related to PPT's business activities and the availability of tax
20 returns.¹⁸ Del Piero testified that some of the requested documents
21 were submitted, while other documents were not.

22
23

¹⁶(...continued)

24 the forms and filled them out. Debtor stated that PPC and Star
25 Alliance's invoices listed a different phone number than that
listed on PPT's invoices.

26 ¹⁷ Debtor testified that PPC was still operating during this
27 time frame as evidenced by an invoice from Quadrant to PPC dated
February 8, 2010. Exhibit R.

28 ¹⁸ Debtor testified that PPT did not file a 2009 tax return
and Debtor does not think PPT filed a 2008 tax return.

Debtor testified that, in December 2009, after PPT closed its business, Debtor emptied PPT's storage and discarded some of PPT's records. Debtor testified that Debtor did not have enough room to store all of PPT's records because the records needed to be stored in Debtor's home, and, at that time, Debtor only rented a single room with very little space. Debtor testified that Debtor retained the most important documents. Exhibit 1, page 10:4-18.

Del Piero testified that PPT's attorney, Charles Greene ("Greene"), made significant efforts to provide documents, however many documents that Del Piero wanted were not available. Del Piero retained counsel in PPT's case and, as such, Del Piero testified that Del Piero was unsure whether PPT ever submitted any ledgers.

Del Piero requested a list of PPT's suppliers¹⁹ and Del Piero testified that PPT turned over the names of one or two of PPT's suppliers. However, Del Piero testified that the number of people with which PPT did business was much greater than one or two. Del Piero based that estimate on the nature of PPT's business activities and the magnitude of PPT's cash stream disclosed in PPT's bankruptcy schedules.

During PPT's continued 341 hearing held on April 8, 2010, Greene stated that the same documents that Del Piero was requesting had previously been submitted to the United States Trustee ("UST") during PPT's Chapter 11 case. Transcript of April 8, 2010 341 hearing, Exhibit 1, page 4:11-25. At the April 8, 2010 341 hearing, Del Piero stated that Del Piero would examine the documents in the UST's possession and instructed Debtor to submit

¹⁹ The "suppliers" referenced in Del Piero's testimony presumably refers to the Independent Contractors.

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1 the documents that Debtor had. Transcript of April 8, 2010 341
2 hearing, pages 12:10-20, 13:4-20 and 15:11-15. Debtor testified
3 that at the conclusion of the April 8, 2010 hearing, Debtor did not
4 believe that Del Piero was asking for any more documents.

5 At the final 341 hearing on April 22, 2010 Del Piero did not
6 ask for any additional documents. Debtor testified that it was
7 Debtor's understanding at the conclusion of the final 341 hearing
8 that no further documents or information were being requested.

9 On April 23, 2010, a report of no distribution was issued in
10 PPT's Chapter 7 case. Exhibit W, page 4. Del Piero testified that
11 PPT's case was not pursued because: it appeared to Del Piero that
12 there were no assets; the lack of readily available funds in the
13 bankruptcy estate; the lack of records; and the representation
14 under oath by the owner of PPT that a large portion of the records
15 had been thrown away. Del Piero testified that Del Piero's counsel
16 advised Del Piero against pursuing the case. Del Piero further
17 testified that the decision not to pursue the case was not an
18 endorsement of the completeness of the records that were provided
19 and did not necessarily endorse Debtor's testimony as credible.

20 Ronald E. Bender ("Bender") is a licensed private investigator
21 and has worked as such since 1992. Bender does not go into the
22 field, but instead conducts electronic searches for individuals for
23 various reasons, such as finding an individual for service.

24 Bender's process to locate an individual includes taking
25 information provided about the individual, such as home address or
26 place of employment, and attempting to obtain identifying
27 information, such as social security number and/or date of birth.
28 Bender will then run the identifying information through various

1 databases, such as public records searches, credit headers through
2 the major credit reporting agencies, secretary of state searches
3 and fictitious business name searches.

4 Bender testified that Bender conducted an electronic search for
5 Lee.²⁰ The search yielded two current addresses for Lee. Lee's
6 current address in California was listed as 1030 East El Camino
7 Real #112, Sunnyvale, California 94087 ("El Camino Address") and
8 the current address outside of California was in Duluth, Georgia.²¹

9 PPC's Statement of Information, filed with the Secretary of
10 State on June 29, 2009 and on April 5, 2010, listed the El Camino
11 Address as both PPC's and Lee's address. Exhibit I. Bender
12 testified that the El Camino Address is a private UPS store, but
13 Bender did not personally know for a fact whether the El Camino
14 Address was a post office box or an office suite.²²

15 The Duluth, Georgia address is owned by Bong Lee and a second
16 individual with the last name of Lee. Bender testified that it was
17 possible that the owner of the Duluth address was either Lee
18 himself or a relative of Lee. Bender further testified that the
19 address listed on PPC's Articles of Incorporation, 1574 Tenaka
20

21 ²⁰ Bender ran a business report to obtain a list of people
22 associated with PPC, and was able to obtain Lee's name, address and
23 redacted social security number. Bender then ran Lee's identifying
24 information in a broader search to obtain Lee's full social
25 security number and then conducted a further search for Lee.

26 ²¹ Debtor testified that Debtor does not know where Lee is
27 located currently.

28 ²² Bender did not personally visit the El Camino Address but
testified that an employee of Bender's process serving company
might have gone to the El Camino Address. Exhibit 28, page 1,
states, "[w]e found" the El Camino "address to be a private mailbox
facility, The UPS Store. The number 112 would be the box number a
party rents within the UPS store."

1 Place, Sunnyvale, California, is no longer a current address for
2 Lee. Exhibit H.

3 Bender testified regarding a second search for an individual by
4 the name of Young Ja Lee ("Young Ja")²³ who is listed as PPC's Chief
5 Executive Officer on PPC's April 5, 2010 Statement of Information.
6 Exhibit I, page 2:5. Bender testified that the search yielded the
7 following information: (1) Young Ja is a female, (2) Young Ja's
8 redacted social security number contains different digits than
9 Lee's social security number; (3) Young Ja was associated with the
10 El Camino Address; and (4) a Young Ja Park was identified, however
11 no social security number, date of birth or other identifying
12 information were found. Bender testified that, using a relative
13 search, Bender was able to establish that Young Ja was associated
14 with addresses used by Lee, but Bender was unable to obtain
15 identifying information for Young Ja.

16 Bender testified that with the average person, Bender is able
17 to discover a full history, address, employment, relatives and
18 associates within 30 seconds. Bender testified that over all the
19 years Bender has conducted electronic searches for people, Young Ja
20 is one of the first that Bender was not able to identify. Bender
21 stated that Bender could not say one way or the other whether Young
22 Ja is a real person.

23 On cross examination, Bender testified that Bender first
24 guessed that Young Ja was a relative of Lee and that Young Ja may
25 not be a legal citizen or may be in the United States on a visa.²⁴

26
27 ²³ Debtor testified that Debtor does not know Young Ja, and
did not know if Lee was married.

28 ²⁴ Korea is Lee's place of birth. Distributorship Agreement,
(continued...)

1 In regard to the electronic search for Lee, Bender testified that
2 it was possible that Lee had died, but the information regarding
3 Lee's death was not yet accessible.²⁵

4
5 II.

6 ANALYSIS

7 The party objecting to a debtor's discharge bears the "burden
8 of proving by a preponderance of the evidence that [the debtor's]
9 discharge should be denied." In re Retz, 606 F.3d 1189, 1196 (9th
10 Cir. 2010). To satisfy the preponderance of evidence standard, the
11 objecting party must "persuade the finder of fact that the
12 proposition is more likely true than not." In re Arnold and Baker
13 Farms, 177 B.R. 648, 654 (9th Cir. BAP 1994), aff'd, 85 F.3d 1415
14 (9th Cir. 1996).

15 "In keeping with the 'fresh' start purposes behind the
16 Bankruptcy Code, courts should construe § 727 liberally in favor of
17 debtors and strictly against parties objecting to discharge." Retz,
18 606 F.3d at 1196, quoting Bernard v. Sheaffer (In re Bernard),
19 96 F.3d 1279, 1281 (9th Cir. 1996).

20
21 ²⁴(...continued)

22 Exhibit Q, page 5. Bender stated that Young Ja could be in the
23 United States legally but would not appear on an electronic search
24 if Young Ja did not have a credit history. Bender's database
25 searches do not give Bender access to information about individuals
26 in the United States on tourists visas. Bender also stated that
individuals in the United States illegally do not register in an
electronic search if the individual does not use a social security
number.

27 ²⁵ Bender testified that information regarding death is
28 accessible electronically after an individual has applied for
social security benefits but, in the absence of such an
application, the information about the death will take about two
years to hit the online database.

1 **A. Actions in PPT's Chapter 7**

2 Creditor seeks a denial of Debtor's discharge based on Debtor's
3 actions in Debtor's current Chapter 7 case and Debtor's actions in
4 PPT's Chapter 7 case. Section 727(a)(7) provides in relevant part:

5 The court shall grant the debtor a discharge, unless --

6 . . .

7 (7) the debtor has committed any act specified in
8 paragraph (2), (3), (4), (5), or (6) of this
9 subsection, on or within one year before the date
10 of the filing of the petition, or during the
case, in connection with another case, under this
title or under the Bankruptcy Act, concerning an
insider;

11 The following elements must be established in order for a
12 Debtor's discharge to be denied under Bankruptcy Code section
13 727(a)(7): (1) the elements of sections 727(a)(2), (3), (4), (5),
14 or (6) are met; (2) the actions occurred during the current case or
15 within one year before the filing of the petition; and (3) the
16 actions are in connection with the bankruptcy case of an insider.

17 Here, the second and third elements of section 727(a)(7) are
18 met. Creditor's allegations center around Debtor's actions in
19 PPT's Chapter 7 case which was filed on February 1, 2010, and is
20 thus within one year of the filing of the current petition, which
21 was filed on February 18, 2010.

22 As to the third element, PPT is an insider of Debtor.
23 Bankruptcy Code section 101(31)(A) provides that if the debtor is
24 an individual the term "insider" includes a "corporation of which
25 the debtor is a director, officer, or person in control."
26 11 U.S.C. § 101(31)(A). PPT is thus an insider of Debtor, as
27 Debtor is the person in control of PPT.

1 The first element, that Debtor committed an act specified in
2 Bankruptcy Code sections 727(a)(2), (3), (4), (5), or (6), is not
3 satisfied, as explained in more detail below.

4 **B. Transfer of Assets**

5 Creditor seeks a denial of Debtor's discharge pursuant to
6 Bankruptcy Code sections 727(a)(2) and 727(a)(7) based on an
7 alleged fraudulent transfer of PPT's business accounts from PPT to
8 PPC. Section 727(a)(2) provides in relevant part:

9 The court shall grant the debtor a discharge, unless --

10 . . .
11 (2) . . . the debtor, with intent to hinder,
12 delay or defraud a creditor . . . has transferred
13 . . .

14 (A) property of the debtor, within one year
15 before the date of the filing of the petition;

16 The following two elements must be met for a discharge to be
17 denied under section 727(a)(2): "1) a disposition of property, such
18 as transfer or concealment, and 2) a subjective intent on the
19 debtor's part to hinder, delay or defraud a creditor through the
20 act of disposing of the property." In re Lawson, 122 F.3d 1237,
21 1240 (9th Cir. 1997). Additionally, both elements need to occur
22 within one year before the filing of the debtor's case. The burden
23 of proof on an objection to discharge under section 727(a)(2) is
24 preponderance of the evidence. In re Beverly, 374 B.R. 221, 243
25 (9th Cir. BAP 2007), aff'd in part and dismissed in part, 551 f.3d
26 1092 (9th Cir. 2008) (appeal of § 727 claims dismissed because
interlocutory).

27 Here, Creditor alleges that PPT transferred PPT's business
28 accounts to PPC. The accounts in question are accounts generated

1 out of the Independent Contractor's relationship with retailers.
2 Creditor has failed to meet Creditor's burden of proof and has not
3 shown by a preponderance of the evidence that Debtor disposed of
4 property with an intent to hinder, delay or defraud creditors.

5 In fact, Creditor did not introduce evidence at trial that
6 would demonstrate that Debtor had any interest in the accounts in
7 question. The evidence presented leads to the interpretation that
8 the Independent Contractors owned the accounts with the retail
9 customers. Debtor testified that the Independent Contractors owned
10 the accounts. Debtor further testified that after Creditor stopped
11 purchasing phone cards from Debtor, Creditor did not turn
12 Creditor's retail accounts over to Debtor. Furthermore, in
13 Creditor's deposition, Creditor testified that Creditor sold the
14 accounts to a third party. Creditor did not testify at trial to
15 challenge Debtor's testimony.

16 Thus, Creditor failed to establish the first element of section
17 727(a)(2) and, consequently, the Court denies Creditor's request to
18 deny Debtor's discharge pursuant to section 727(a)(2).

19 **C. Failure to Keep and Produce Adequate Records**

20 Creditor seeks denial of Debtor's discharge pursuant to
21 Bankruptcy Code sections 727(a)(3) and (7). Section 727(a)(3)
22 provides in relevant part:

23 The court shall grant the debtor a discharge, unless --

24 . . .
25 (3) the debtor has concealed, destroyed, mutilated,
26 falsified, or failed to keep or preserve any recorded
27 information, including books, documents, records, and
28 papers, from which the debtor's financial condition or
business transactions might be ascertained, unless
such act or failure to act was justified under all of
the circumstances of the case;

1 The plaintiff has the initial burden of proof under section
2 727(a)(3). In re Cox, 41 F.3d 1294, 1296 (9th Cir. 1994), citing
3 Fed. R. Bankr. P. 4005. A creditor objecting to discharge must
4 show the following in order to state a prima facie case under
5 section 727(a)(3): "(1) that the debtor failed to maintain and
6 preserve adequate records, and (2) that such failure makes it
7 impossible to ascertain the debtor's financial condition and
8 material business transactions." Cox, 41 F.3d at 1296. "[W]hile
9 section 727(a)(3) "does not require absolute completeness in the
10 records, it does require a debtor to keep and preserve records that
11 will enable his creditors to accurately ascertain his financial
12 condition and business transactions." In re Fader, 414 B.R. 640,
13 645 (Bankr. N.D. Cal. 2009). "If the objecting creditor makes out
14 a prima facie case, the burden of proof then shifts to the debtor
15 to justify the inadequacy or non-existence of the records." Cox,
16 41 F.3d at 1296.

17 Creditor has failed to prove a prima facie case under section
18 727(a)(3). Creditor did not present evidence to establish that
19 Debtor failed to maintain records while PPT was operating. The
20 issue is whether Debtor failed to preserve adequate records once
21 PPT went out of business.

22 The evidence presented at trial does establish that Debtor
23 destroyed some of PPT's records and that Del Piero did not receive
24 some of the records which Del Piero requested. Del Piero testified
25 that Debtor turned over the names of one or two of PPT's suppliers
26 but Del Piero believed that Debtor had more suppliers that were not
27 disclosed.
28

1 However, the evidence does not satisfy the second element, that
2 Debtor's failure to preserve records made it impossible to
3 ascertain Debtor's or PPT's financial condition and material
4 business transactions. Creditor did not submit evidence that
5 supports such a finding. In fact, the testimony of Del Piero
6 refutes such a finding, as Del Piero testified that, based on the
7 available records, Del Piero's attorney ascertained that PPT
8 appeared to have no assets. Therefore, even though the
9 documentation provided was not complete, the Chapter 7 Trustee and
10 the Chapter 7 Trustee's attorney concluded, based on the available
11 documents, that PPT's Chapter 7 case should not be pursued.

12 In any event, Debtor provided a sufficient justification for
13 why some of PPT's business records were destroyed. Debtor
14 testified that Debtor disposed of some of PPT's records after PPT
15 stopped operating because Debtor was renting one room and Debtor
16 did not have enough space to keep all of the records. Debtor,
17 however, did keep the records which Debtor believed to be the most
18 important. The Court denies Creditor's request to deny Debtor's
19 discharge under Bankruptcy Code sections 727(a)(3) and (7).

20 **D. False Oath**

21 Creditor seeks a denial of Debtor's discharge under Bankruptcy
22 Code sections 727(a)(4) and (7) based on alleged false oaths that
23 Debtor made in PPT's Chapter 7 bankruptcy case. Section 727(a)(4)
24 provides in relevant part:

25 The court shall grant the debtor a discharge, unless --

26 . . .

27 (4) the debtor knowingly and fraudulently, in or in
28 connection with the case --

 (A) made a false oath or account;

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1 "To prevail on this claim, a plaintiff must show, by a
2 preponderance of the evidence, that: '(1) the debtor made a false
3 oath in connection with the case; (2) the oath related to a
4 material fact; (3) the oath was made knowingly; and (4) the oath
5 was made fraudulently.'" Retz, 606 F.3d at 1197, quoting
6 Roberts v. Erhard (In re Roberts), 331 B.R. 876, 882 (9th Cir. BAP
7 2005).

8 Creditor contends that Debtor made the following false
9 statements: (1) On February 25, 2010, at the 341 Hearing in PPT's
10 Chapter 7 case, Debtor claimed that Debtor had no connection to
11 PPC, apart from buying phone cards²⁶ and Debtor allegedly repeated
12 in multiple 341 hearings that Debtor did not have knowledge about
13 PPC's activities; and (2) Debtor allegedly repeated in multiple 341
14 hearings that Debtor did not know where PPT's customers went and
15 Debtor stated during PPT's February 25, 2010 341 hearing that
16 Debtor did not know whether PPC was selling phone cards to PPT's
17 customers and also did not know the source of Rubio's cards.
18 Exhibit 1, page 70:6-22. Creditor argues that the alleged false
19 statements outlined above were intentional misstatements of
20 Debtor's employment status and were used to disguise the status of
21 Debtor's assets. Each alleged misstatement will be addressed in
22 turn.

23
24
25 ²⁶ Debtor did not state that Debtor had no connection to PPC
26 apart from buying phone cards. Debtor actually stated during the
27 341 hearing on February 25, 2010, that Debtor was currently
28 unemployed, had no involvement in the phone card business, and did
not have any interest in any phone card business operations.
Transcript of 2/25/10 341 hearing, Exhibit 1, pages 64:24 - 65:15.
Debtor further testified that PPC had not taken over PPT's business
and that PPC was PPT's major supplier. Transcript of 2/25/10 341
hearing, Exhibit 1, pages 29:15-23 and 70:1-5.

1 First, Creditor has not established that there is a connection
2 between any of these statements and any assets of the Debtor.
3 Creditor did not prove that Debtor received any assets from PPC.
4 Second, Creditor has failed to establish by a preponderance of the
5 evidence (1) that Debtor had a business connection to PPC apart
6 from buying phone cards and (2) that Debtor's assertions of lack of
7 knowledge regarding PPC's activities are false statements.
8 Creditor argues that PPC was either a "straw company" into which
9 Debtor transferred PPT's assets or, at a minimum, Debtor operated
10 PPC.

11 The Court notes that while Creditor presented multiple
12 witnesses and documents, Creditor presented absolutely no evidence
13 of money having been transferred from PPC to Debtor. Moreover, it
14 is the Court's understanding that Creditor did not subpoena
15 Debtor's bank or other financial records to determine whether or
16 not Debtor had received distributions of any kind from PPC.
17 Rather, Creditor supports Creditor's contention that Debtor and PPC
18 had a relationship -- beyond simply PPT purchasing phone cards from
19 PPC -- with the following assertions: (1) Debtor communicated with
20 Quadrant regarding phone cards for over two years, while Lee was
21 only in contact with Quadrant twice; (2) PPT's customers, the
22 Independent Contractors, switched over to PPC; (3) Banuelos
23 believed that PPT and PPC were the same company; (4) Debtor's ex-
24 wife worked for PPC; (5) Lee worked for PPT prior to the creation
25 of PPC and Lee's current location is unascertainable; and (6) Young
26 Ja, the individual currently listed as the Chief Executive Officer
27 of PPC, is a non-existent individual.
28

1 Turning first to Debtor's communication with Quadrant, Creditor
2 seeks to establish Debtor's involvement with PPC by presenting
3 evidence which shows that, for a little over two years, Debtor
4 intermittently interacted with PPC's major supplier regarding
5 product discounts, design, distribution areas and product quantity.
6 The fact that Debtor interacted with Quadrant in this way does not
7 make the inference that Debtor managed PPC, or that Debtor had an
8 interest in PPC, more likely than other possible explanations.

9 Debtor's credible testimony paints an entirely different
10 picture. Debtor testified that Lee formed PPC at a time when it
11 was common knowledge that PPT needed phone cards and, in fact, Lee
12 had personal knowledge of that fact. After agreeing to purchase
13 phone cards from PPC, Lee asked Debtor to communicate with PPC's
14 supplier directly because Lee did not speak English well and Debtor
15 agreed to do so. Debtor further testified that Debtor passed the
16 information obtained from Quadrant along to Lee, who would make the
17 ultimate decisions. Furthermore, Debtor had an interest in
18 communicating to Quadrant about the phone cards, as those were the
19 cards that Debtor testified PPT was purchasing from PPC.

20 Additionally, the fact that Lee only had an initial meeting
21 with Quadrant in July 2007, and thereafter only spoke to Quadrant
22 one other time, does not make Creditor's conclusion more likely
23 than other possibilities. As stated earlier, a more likely
24 alternative is that Lee saw an opportunity to make money as PPT's
25 supplier and therefore, in an effort to step in the place of CAT
26 and TCI, sought out and obtained a source of phone cards. Further,
27 it is logical that having created a contractual relationship with
28 Quadrant, Lee was comfortable allowing Debtor to communicate with

1 Quadrant because of Lee's lack of English skill and because
2 suppliers, like Quadrant, had a policy of only selling phone cards
3 to one company in a certain geographical area.

4 Second, simply because the Independent Contractors who
5 purchased from PPT began purchasing from PPC does not make it more
6 likely than not that PPT and PPC are the same company or that
7 Debtor has an interest in PPC. Debtor testified credibly at trial
8 that Rubio, PPT's largest Independent Contractor, no longer felt
9 comfortable buying from PPT because of PPT's Chapter 11 case.
10 Further, Creditor has not shown that the Independent Contractors
11 could only have learned of PPC through Debtor. The Independent
12 Contractors could obtain the name of PPC or Quadrant through their
13 connections in the industry or even by looking at the face of the
14 cards that PPT supplied. If the Independent Contractors were
15 uncomfortable with PPT, then the Independent Contractors could
16 easily find an alternative source of cards. Additionally, PPT's
17 business did not simply shift over to PPC around November 2009.
18 PPC was in the practice of selling cards to entities other than PPT
19 as early as June 2009. In any event, even if some Independent
20 Contractors learned of PPC from Debtor (which was not proven at
21 trial), that would not demonstrate that Debtor had a financial
22 interest in PPC.

23 Third, Banuelos testified that Banuelos believed that PPT had
24 changed PPT's name to PPC and further believed that the company is
25 currently called Star Alliance. Banuelos received phone cards from
26 one independent contractor, Cervantes, who purchased cards from
27 PPT, PPC and Star Alliance. This testimony is insufficient to
28 establish that it is more likely than not that PPT and PPC are the

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1 same company or that Debtor had an interest in PPC. The testimony
2 simply establishes that the same Independent Contractor sold cards
3 to Banuelos and the invoices that Cervantes presented to Banuelos
4 established that the source of the cards changed over time.

5 Fourth, Creditor asserts that because Debtor's ex-wife, Betty
6 Ro, worked for PPC, Debtor had an interest in PPC or knowledge of
7 PPC's activities. Debtor testified that Debtor and Ro did not
8 communicate regarding PPC. If Ro had been Debtor's current wife,
9 then Creditor's assertion would be stronger. However, Ro is
10 Debtor's ex-wife and the Court finds Debtor's testimony credible.

11 Debtor testified that Ro had worked previously for PPT doing
12 administrative work. A more likely explanation of why Ro worked
13 for PPC is that Ro and Lee met while each were involved with PPT.
14 The dates of Ro's involvement at PPT were not divulged during the
15 trial, so this fact cannot be conclusively established. Ro was not
16 called to testify at trial.

17 Fifth, Creditor contends that Lee worked for PPT prior to the
18 creation of PPC. As stated previously, it is not more likely that
19 Lee acted as a "straw man" than the alternative -- that Lee simply
20 saw a business opportunity and took advantage of it. The fact that
21 Creditor was unable to locate Lee after PPC stopped operating also
22 does not make it more likely than not that PPC was a "straw
23 company" or that Debtor had an interest in PPC. As Debtor and
24 Bender testified, PPC went out of business and Lee could be ill or
25 deceased.

26 Sixth, Creditor asserts that Young Ja, the individual currently
27 listed as the president of PPC, is a non-existent individual.
28 Bender did not testify that Bender believed that Young Ja is a non-

1 existent individual. In fact, the most logical conclusion is that
2 Young Ja is an individual visiting the United States from another
3 country and has not established a credit history. However, even if
4 Young Ja were a non-existent person, that would not establish that
5 Debtor owned, or had an interest in, PPC.

6 Creditor's allegations, separately or taken together, do not
7 amount to a conclusion that it is more likely than not that PPC was
8 operating as a "straw company" for PPT, or that Debtor had an
9 interest in PPC. Debtor presented evidence in the form of
10 testimony and documents which establishes that PPC and PPT were in
11 fact separate companies.²⁷ Creditor has failed to establish that
12 Debtor falsely stated that Debtor's only connection to PPC was for
13 the purpose of purchasing phone cards, and as such, the first
14 element of section 727(a)(4) is not satisfied.

15 Finally, Creditor alleges that Debtor falsely stated in PPT's
16 341 hearing on February 25, 2010 that: (a) Debtor did not know
17 whether PPC was selling cards to any of PPT's former Independent
18 Contractors; (b) none of the Independent Contractors told Debtor
19 that the Independent Contractors were purchasing from PPC; and
20 (c) Debtor did not know the source of Rubio's cards. Exhibit 1,
21 page 70:1-23. Creditor has failed to prove that these are
22 materially false statements.

23 The Court finds Debtor's testimony, in which Debtor stated that
24 Debtor did not know for sure where the Independent Contractors were
25 purchasing cards, to be credible. Debtor testified that PPT ceased
26 operations in the end of 2009 because PPT was not generating enough
27

28 ²⁷ Such as the PPC's invoices to PPT and PPT's corresponding
cancelled checks. Exhibit L.

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1 business, and that Debtor did not stay in contact with the
2 Independent Contractors after that time. Debtor may have had an
3 idea that some of the Independent Contractors were purchasing cards
4 from PPC. In fact, Debtor likely believed that was a possibility,
5 as supported by Debtor's testimony regarding Rubio. Debtor
6 testified that Rubio asked Debtor whether Rubio could buy cards
7 from PPC and Debtor told Rubio that was between Rubio and PPC.

8 The fact that Debtor believed the Independent Contractors could
9 be purchasing from PPC does not make Debtor's statement at the
10 February 25, 2010 341 hearing false. Debtor's statement at that
11 hearing was in response to a question which asked whether Debtor
12 **knew** if PPC was still selling to any of the Independent Contractors
13 and Debtor responded that Debtor did not know. Debtor was not
14 asked whether there was any reason for Debtor to believe that PPC
15 was selling to any of the Independent Contractors. All that
16 Creditor has established is that Debtor had reason to believe that
17 one of the Independent Contractors was purchasing from PPC, not
18 that Debtor had affirmative knowledge of that fact, or any specific
19 knowledge regarding the other Independent Contractors.

20 Even if the Court did agree with Creditor -- that Debtor's
21 statement regarding Debtor's knowledge of the source of the
22 Independent Contractor's phone cards was false -- the statement is
23 not material. A fact is considered material when it relates to
24 "the debtor's business transactions or estate, or concerns
25 discovery of assets, business dealings, or the existence and
26 disposition of debtor's property." Retz, 606 F.3d at 1198. A
27 misstatement is material when it "detrimentally affects
28 administration of the estate." Retz, 606 F.3d at 1198.

1 Here, if the statement is considered false the statement is not
2 material because the statement did not relate to Debtor or PPT's
3 assets, property or business dealings. Rather the statement
4 related to the actions and property of third parties. Creditor has
5 failed to establish that PPT and PPC are one in the same company,
6 that Debtor had an interest in PPC, or that the accounts were
7 Debtor's property. Therefore, whether or not individuals who at
8 one time purchased from PPT are now purchasing from another company
9 is not material.

10 Based on the evidence admitted at the trial and the arguments
11 of counsel, the Court finds that Creditor has failed to prove by a
12 preponderance of the evidence that Debtor made a false oath in
13 connection with PPT's Bankruptcy case or in connection with
14 Debtor's current Chapter 7 case. Therefore, the Court will not
15 deny Debtor a discharge under Bankruptcy Code Sections 727(a)(4)
16 or (7).

17 **E. Failure to Properly Explain Loss of Assets**

18 Creditor seeks a denial of Debtor's discharge under Bankruptcy
19 Code sections 727(a)(5) and (a)(7). Section 727(a)(5) provides in
20 relevant part:

21 The court shall grant the debtor a discharge, unless --

22 . . .
23 (5)the debtor has failed to explain satisfactorily,
24 before determination of denial of discharge under this
25 paragraph, any loss of assets or deficiency of assets
to meet the debtor's liabilities;

26 The objecting party bears the burden of proof under section
27 727(a)(5) and "must demonstrate: (1) debtor at one time, not too
28 remote from the bankruptcy petition date, owned identifiable

1 assets; (2) on the date the bankruptcy petition was filed or order
2 of relief granted, the debtor no longer owned the assets; and
3 (3) the bankruptcy pleadings or statement of affairs do not reflect
4 an adequate explanation for the disposition of assets." Retz, 606
5 F.3d at 1205. Once the creditor has established a prima facie
6 case, "the debtor must offer credible evidence regarding the
7 disposition of the missing assets." Retz, 606 F.3d at 1205.

8 Creditor argues that Debtor failed to explain sufficiently the
9 failure of PPT. This argument does not satisfy the elements
10 required for a denial of discharge under section 727(a)(5). The
11 first element is met -- Creditor has established that Debtor owned
12 an identifiable asset, PPT, at a time not too remote from the
13 filing of the petition. The second element, however, is not met.
14 On the date the bankruptcy petition was filed, Debtor continued to
15 own PPT, and continues still to own PPT, however Debtor is no
16 longer operating PPT.

17 Additionally, Debtor's discharge cannot be denied under
18 Bankruptcy Code sections 727(a)(5) and (7) based on the allegation
19 that, during PPT's Chapter 7 case, Debtor failed to explain
20 properly the loss of the accounts or any other property. As
21 previously discussed, Creditor has not established by a
22 preponderance of the evidence that PPT owned the accounts in
23 question. In fact, from the evidence presented, the Court
24 concludes that the accounts were owned by the Independent
25 Contractors. Furthermore, Creditor has not pointed to any other
26 property owned by PPT or Debtor that has been diminished or lost.
27 Therefore, the first element under section 727(a)(5), that the
28 Debtor own property, has not been established.

1 Based on the evidence presented at trial and the arguments of
2 the attorneys, the Court will not deny Debtor a discharge based on
3 Bankruptcy Code section 727(a)(5) and (7).

4 **F. Failure to Complete Financial Management Course**

5 Creditor's complaint requests that Debtor's discharge be denied
6 pursuant to Bankruptcy Code section 727(a)(11). Bankruptcy Code
7 section 727(a)(11) provides in relevant part that "the court shall
8 grant the debtor a discharge unless . . . after filing the
9 petition, the debtor failed to complete an instructional course
10 concerning personal financial management . . ." Federal Rule of
11 Bankruptcy Procedure 1007(c) ("Rule 1007(c)") provides that a
12 debtor must file the statement of completion of a course concerning
13 personal financial management within 45 days after the first date
14 set for the meeting of creditors. Rule 1007(c) further provides
15 that "[t]he court may, at any time and in its discretion, enlarge
16 the time to file [the financial management certificate]."

17 Creditor failed to address this cause of action. However, that
18 is likely due to the fact that Debtor timely filed a certificate
19 evidencing Debtor's completion of the financial management course.
20 Pursuant to Rule 1007(c), the deadline for filing a financial
21 management certificate was on May 9, 2010, which is 45 days after
22 March 25, 2010, the first date set for the meeting of creditors.

23 Debtor completed the financial management course on April 19,
24 2010, but failed to file evidence of completion before May 9, 2010.
25 However, on June 29, 2010, the Court enlarged the time to file the
26 financial management certificate and required Debtor to file the
27 certificate within 45 days of June 29, 2010. Debtor complied and
28

1 filed the financial management certificate the following day, on
2 June 30, 2010.

3 The Court denies Creditor's request to withhold Debtor's
4 discharge under Bankruptcy Code section 727(a)(11).

6 III.

7 CONCLUSION

8 For the foregoing reasons, Creditor's complaint to deny
9 Debtor's discharge pursuant to Bankruptcy Code sections 727(a)(2),
10 (3), (4), (5), (7) and (11) is denied. The Court finds that
11 Creditor has failed to satisfy the necessary elements by a
12 preponderance of the evidence. Accordingly, Debtor's discharge
13 should be entered. Counsel for Debtor shall prepare a proposed
14 form of order, serve it on counsel for Creditor, and submit it to
15 the Court.

16
17
18 Dated:

4/15/11


ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

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